STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL L. ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
May 15, 2003

No. 233761
Wayne Circuit Court
LC Nos. 99-004310;
99-004311

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a consolidated bench trial, defendant was convicted of two counts of assault with intent to commit murder, MCL 750.83, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty to forty years for each assault conviction, to be served consecutively to two concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of his presentence investigation report.

Defendant's convictions arise from allegations that he assaulted the complainant on February 7 and 11, 1999, because the complainant was pursuing a woman that defendant was dating. According to the complainant, defendant phoned him before February 7 and came to his workplace to "convince" him to have no further contact with Charita Elledge. At approximately 1:00 p.m. on February 7 defendant approached the complainant in his driveway and again directed him to "leave [Elledge] alone." The complainant testified that defendant told him that he was not going to kill him, but was going to shoot him in the leg to demonstrate his seriousness. Defendant told the complainant to stand still and warned him that he would be shot in the head if he ran. In response, the complainant ran through his backyard, jumped a fence, and escaped down an alley. The complainant testified that he could see defendant shooting at him. Two of the complainant's neighbors testified that they observed the complainant running through the neighborhood as a man was chasing him with an automatic weapon. One neighbor heard the man in pursuit yell, "halt," and saw him fire two or three shots at the complainant. The complainant managed to escape without injury, and reported the incident to the police. The complainant had no further contact with defendant until February 11.

The complainant testified that defendant called his home several times on February 11 as he and a friend, Monique Simon, were preparing to go out. Approximately ten minutes later, the complainant's mother arrived and drove them to her house so that the complainant could borrow

her second car. The complainant rode in the backseat and Simon was in the front passenger seat. On the way to his mother's house, the complainant saw defendant driving a white Thunderbird. Upon arriving at his mother's house, the complainant, his mother, and Simon all observed a white Thunderbird drive past the house, turn the corner, come back, and park two houses down. Thereafter, the complainant and Simon got out of the car and got into a different car. The complainant then heard two gunshots and saw defendant firing at him from the Thunderbird. Defendant then blocked the driveway so that the complainant could not drive away. The complainant pushed Simon down on the floor of the car, put the car in reverse, and "rammed" his car into defendant's driver's side door. As the complainant was driving toward defendant's car, defendant fired four or five shots at the complainant's car and then fled the scene. One of the bullets struck the complainant in his hip. Both the complainant and his mother identified defendant at trial as the shooter.

Defendant testified at trial and denied any wrongdoing. He claimed that he did not "really" know the complainant, denied that he was dating Elledge, and denied that he ever owned a white Thunderbird. He maintained that at the time of the shooting he was cleaning the carpet of a Bloomfield Hills law firm. Defendant presented the law firm's secretary as an alibi witness to corroborate his story. However, the owner of the law firm testified that his carpet was never cleaned in 1999, nor did he ever give permission for it to be cleaned. With regard to the incident on February 11, defendant maintained that he was having dinner at a restaurant in Ann Arbor with some friends at the time of the shooting. Defendant presented the testimony of two alibi witnesses to corroborate his testimony.

I

Defendant first argues that the trial judge abused her discretion by denying his motion to disqualify after she accepted his plea of nolo contendere, which was subsequently withdrawn. In order to preserve a judicial disqualification issue for appellate review, the defendant must first move for disqualification before the challenged judge and, if the motion is denied, request referral to the chief judge for review of the motion de novo. MCR 2.003(C)(3)(a); *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Because defendant did not seek review of the denial of his motion for disqualification by the chief judge, defendant has not preserved this issue for review. *Id.* Therefore, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Absent actual personal bias or prejudice against either a party or a party's attorney, a judge will not be disqualified. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). A judge's opinions that are formed on the basis of facts introduced or events that occur during the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Cain, supra* at 496. Further, judicial rulings alone rarely establish disqualifying bias or prejudice. *Id.* A party who challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id.* at 497.

Here, defendant has failed to demonstrate any actual bias or prejudice on the part of the trial judge, or that he was otherwise prejudiced, as a result of his aborted plea. Before the

presentation of any evidence, defendant voluntarily waived his right to a jury trial and elected to proceed with a bench trial. Thereafter, the trial commenced and the trial judge heard the testimony of seven witnesses over four days. On the fourth day of trial, defendant indicated that he wanted to accept the trial court's *Cobbs*[1] evaluation and tendered a plea of nolo contendere, which the trial court ultimately accepted. During the plea proceedings, the parties and the trial judge relied on the testimony that was presented during the trial to establish the factual basis for defendant's plea. Subsequently, defendant's plea was withdrawn because the legislative sentencing guidelines were higher than the agreed upon sentence.

Under these circumstances, defendant was not prejudiced where the court was already privy to the facts that were used to substantiate his plea, and no additional facts were presented during the plea proceeding. Further, the trial judge noted that, upon the continuation of the trial, defendant could exercise his right to call and cross-examine any additional witness. Finally, there is simply nothing in the record to suggest that the trial judge improperly considered defendant's aborted plea in reaching its verdict. Accordingly, defendant has failed to meet his burden of establishing actual bias on the part of the trial judge, and it therefore follows that he has failed to demonstrate plain error. Thus, he is not entitled to a new trial on this basis.

II

Defendant next argues that the trial court erred by admitting an eyewitness' in-court identification where there was no pretrial lineup or photo array. A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*

Although identification procedures that are unnecessarily suggestive and conducive to irreparable misidentification deny a defendant due process, *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), the record contains no indication that any impermissible or unduly suggestive identification procedures occurred here. First, defendant has failed to provide any authority for his proposition that a pretrial lineup or photo array is required before a witness may make an in-court identification. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Moreover, even if the identification could be considered tainted simply because the witness did not participate in a pretrial lineup or photo array, the record establishes that there was an independent basis to admit her in-court identification of defendant. See *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).

Additionally, although the witness testified that she did not know defendant before the shooting, the record established that she had an ample opportunity to observe him before, during, and after the shooting. The witness testified that she was in her driveway when she saw defendant drive by her house, turn the corner, come back and park two houses down. She then saw defendant shooting at the complainant. The complainant thereafter rammed his car into

[1] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

defendant's car, and the witness saw defendant get out of his car and flee. The witness indicated that she "got a good enough look at [defendant's] face to identify him." In sum, because there was an independent basis to admit the witness' in-court identification of defendant, the trial court did not clearly err in admitting the evidence. Accordingly, defendant is not entitled to a new trial on this basis.

III

Defendant argues that he is entitled to a new trial because the prosecutor improperly argued facts not in evidence when she advised the trial court that defendant had previously been arrested while carrying the same type of weapon as the one used in the instant case. Because defendant did not object to the prosecutor's conduct below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights.[2] *Carines*, *supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A prosecutor may not make a statement of fact that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, despite defendant's posit of this issue, it merely concerns the prosecutor's attempt to introduce evidence, as opposed to arguing facts not in evidence. During trial, the prosecutor sought to present evidence concerning defendant's alleged previous arrest and possession of a weapon; defendant objected, and the court took the matter under advisement. Surely, the prosecutor could attempt to admit evidence against defendant, and there is nothing to suggest that the prosecutor's request was improper or was simply a scheme to inject inadmissible evidence. Further, a review of the record reveals that there were no repeated references to the proposed evidence, and the prosecutor made no further requests to introduce the evidence after the court took the matter under advisement.

Moreover, it is highly improbable that the prosecutor's conduct affected this bench trial verdict. "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Indeed, the trial court made no reference to the proposed evidence when it found defendant guilty on the basis of other, properly admitted evidence. Because the prosecutor's conduct was not improper, defendant has failed to demonstrate plain error. Accordingly, defendant is not entitled to a new trial on this basis.

IV

Defendant next argues that defense counsel was ineffective for failing to continue the cross-examination of the complainant's mother.[3] Defendant did not make a testimonial record

[2] Although defense counsel objected to the admission of the proposed evidence, he did not object to the prosecutor's act of requesting that the court admit the evidence.

[3] Defense counsel's cross-examination was apparently interrupted by an objection and defense counsel's request for an adjournment. After a conference in chambers, the trial resumed with the next prosecution witness. Several days later, the prosecutor inquired whether defense counsel wanted to recall the witness, and he indicated that he did. After a two-month adjournment, the

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concerning this issue in the trial court. Thus, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Ineffective assistance of counsel can take the form of a failure to call a witness only if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*; *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Moreover, decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. *Kelly, supra*; *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

Defendant contends that additional cross-examination would have resulted in impeachment of the witness' identification testimony. However, defendant has failed to indicate what damaging information could have been elicited through cross-examination that would have impeached the witness' identification. Further, defense counsel could have strategically chosen not to recall the witness for various reasons, including the fact that her additional testimony could have been injurious to defendant's case. As previously indicated, during direct examination, the witness testified that she saw defendant drive by her house, turn the corner, come back, park two houses down, and shoot at the complainant. She also saw defendant get out of his car and flee. The witness testified that she "got a good enough look at [defendant's] face to identify him."

Considering that the witness positively identified defendant as the perpetrator during direct examination, providing the witness with a second opportunity to reiterate her identification certainly could have been more damaging than helpful. In addition, given the complete lack of information regarding how the witness' testimony could have been impeached, it appears that defense counsel's decision not to recall the witness was a matter of sound trial strategy. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id.*

Moreover, even if defendant could overcome the presumption of sound trial strategy, it is unlikely that defense counsel's failure to recall the witness prejudiced defendant by denying him

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trial was concluded without the witness being recalled.

a substantial defense. There was other compelling identification evidence presented at trial, including the complainant's own detailed testimony. In addition, a review of the record reveals that defense counsel presented a vigorous defense, including the presentation of several alibi witnesses. In fact, one of the alibi witnesses was a police officer. Defendant also testified and denied any involvement in the crimes. Nonetheless, the trial court plainly accepted the complainant's version of the events. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to recall the witness, the result of the proceeding would have been different. *Effinger*, *supra*. Therefore, defendant is not entitled to a new trial on this basis.

V

Defendant argues that the trial court's findings of fact were insufficient and that his conviction must therefore be reversed. We disagree.

MCR 6.403 requires a trial court, sitting without a jury, to find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The requirements of the court rule are satisfied as long as it appears from the court's findings that the court was aware of the factual issues in the case and correctly applied the law. *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). The trial court need not make specific findings of fact about each element of the crime. *Id.* Here, the trial court fully summarized the facts of the case, and correctly focused on the elements of the charged crimes. Contrary to defendant's claim, there is no requirement that the court indicate in its findings of fact that it presumed defendant was innocent, or that the prosecution had the burden of proof. Accordingly, defendant is not entitled to a new trial on this basis.

VI

Defendant next argues that he is entitled to resentencing because the trial court improperly scored offense variable (OV) 10. We disagree.

Because the offenses occurred in February 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). If a sentencing issue requires the application of the instructions in the legislative sentencing guidelines, a question of law is presented that is reviewed by this Court de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

With regard to OV 10 (exploitation of a vulnerable victim), MCL 777.40(1)(a) directs a score of fifteen points if "[p]redatory conduct" was involved. "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Here, there was evidence that defendant repeatedly phoned the complainant and threatened him and also went to his place of employment and threatened him before the shooting. On the day of the first shooting, defendant went to the complainant's home, approached him, and told him that he was going to shoot him in the leg to show him that his threats were legitimate

and that, if he ran, he would be shot in the head. Defendant then chased the complainant through his neighborhood while firing several shots at him. On the day of the second shooting, defendant phoned the complainant's home on several occasions. Defendant thereafter went to the complainant's home, followed the complainant to his mother's house, and, after arriving, circled the block, stopped, parked and eventually fired several shots at the complainant. Under these circumstances, the trial court did not abuse its discretion by assessing fifteen points for OV 10. See *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002).[4] Accordingly, defendant is not entitled to resentencing on this basis.

VII

Defendant also argues that he is entitled to resentencing because the presentence investigation report (PSIR) contained inaccurate information that he had been convicted of two prior "assaultive convictions," and had been arrested for felonious assault and assault with intent to do great bodily harm. If information in the presentence report is challenged, the court "must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing." MCR 6.425(D)(3). Here, the trial court accepted defendant's objections to information that defendant had two prior assault convictions and two prior assault arrests and stated that it would not consider that information in sentencing defendant. There is simply no basis, beyond mere conjecture, for concluding that the trial court considered the challenged information during sentencing. Accordingly, defendant has failed to demonstrate that he was prejudiced and, therefore, he is not entitled to resentencing on this basis.

VIII

Finally, the prosecutor concedes that defendant is entitled to have the inaccurate information in the PSIR stricken from the report and to have a copy of the corrected PSIR sent to the Department of Corrections. Therefore, we remand for the sole purpose of having the trial court strike the challenged information from the PSIR. MCL 771.14(6); MCR 6.425(D)(3); *People v Fleming*, 428 Mich 408, 418; 410 NW2d 266 (1987).

Affirmed, but remanded in part for the ministerial task of correcting the presentence report. Jurisdiction is not retained.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

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[4] In *Kimble*, this Court affirmed a trial court's finding of predatory conduct where the evidence indicated that the defendant drove around looking for a victim for about an hour and followed the victim home for the purpose of committing a crime.